

# ARKANSAS SUPREME COURT

No. CR 07-1263

NICKOLAUS HAMPTON  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered September 18, 2008

APPEAL FROM THE CIRCUIT COURT  
OF PULASKI COUNTY, CR 2003-634,  
HON. CHRIS PIAZZA, JUDGE

AFFIRMED.

## PER CURIAM

In 2003, appellant Nickolaus Hampton was convicted by a jury of rape and sentenced to 300 months' incarceration. The Arkansas Court of Appeals affirmed. *Hampton v. State*, CACR 04-362 (Ark. App. Feb. 23, 2005). Subsequently, appellant timely filed in the trial court a verified petition under Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition after a hearing, and appellant has lodged an appeal here from the order. The decision of the trial court is affirmed.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

Postconviction relief under Rule 37.1 is a means to collaterally attack a conviction and is not a means for direct attack on the judgment. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001); *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000). The presumption that a criminal judgment

is final is at its strongest in collateral attacks. *Williams v. State*, 346 Ark. 54, 56 S.W.3d 360 (2001). Nevertheless, when a petitioner demonstrates an error that is so fundamental as to render the judgment of conviction void and subject to collateral attack, the issue may be raised collaterally. *E.g., Rowbottom, supra* (finding that a violation of double-jeopardy is a fundamental error); *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996) (finding that the right to a twelve-person jury is a fundamental right); *compare Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006) (finding that prosecutorial misconduct is not a fundamental error).

Here, appellant's claim under Rule 37.1 is based on the inconsistent verdicts rendered by two different juries in different trials for appellant and his codefendant, Montee Lambert.<sup>1</sup> Appellant complains that his due process and constitutional rights under the Fourteenth Amendment to the United States Constitution and Article 2 § 8 of the Arkansas Constitution were denied to him as shown solely by the inconsistent verdicts. He claims that he is entitled to seek postconviction relief based on this argument as a constitutional violation or a valid collateral attack on the judgment.<sup>2</sup>

The threshold issue for determination is whether inconsistent verdicts trigger an error "so basic that it renders the judgment a complete nullity[.]" *Jeffers v. State*, 301 Ark. 590, 591, 786 S.W.2d 114, 114 (1990) (quoted in *Howard*, 367 Ark. at 26–27, 238 S.W.3d at 32). If the question is answered in the affirmative, the matter can be raised for the first time in a petition under Rule

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<sup>1</sup>Both appellant and Lambert were charged with rape, kidnapping and theft of property. Lambert was also charged with attempted first-degree murder. The State entered a *nolle prosequi* as to theft of property for both defendants. Appellant was found guilty of rape but not kidnapping, and Lambert was acquitted on all charges.

<sup>2</sup>In the original petition filed in the trial court, appellant also argued that trial counsel was ineffective in two instances: (1) for failing to comply with procedural requirements in seeking a continuance; (2) for failing to introduce a convenience store video tape into evidence. Neither of these arguments is addressed on appeal. Claims raised below but not argued on appeal are considered abandoned. *State v. Grisby*, 370 Ark. 66, 257 S.W.3d 104 (2007).

37.1. Otherwise, the issue should have been raised at trial or on direct appeal and does not present a claim that is cognizable in a Rule 37.1 petition. *Camargo, supra*.

In a case analogous to the instant matter, Cecelia Roleson and her husband, Jerry Roleson, were convicted of the murder of Carl Lipe. On direct appeal, Jerry's conviction was dismissed due to lack of corroborating evidence and Cecelia's conviction was reversed for error. *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981). Cecelia was re-tried for murder and found guilty by a second jury. She appealed the conviction based in part on the dismissal of Jerry's conviction. *Roleson v. State*, 277 Ark. 148, 640 S.W.2d 113 (1982).

In Cecelia's second appeal, we held that Arkansas Statutes Annotated § 41-304(2) (Repl. 1977), currently codified as Arkansas Code Annotated § 5-2-405(2) (Repl. 2006), controlled and that it was no defense for Cecelia that Jerry had been acquitted. This statute was a departure from common law and intended to close the loophole that prevented an accomplice from being tried if the principal had been acquitted.<sup>3</sup> *Roleson, supra*. Now, there is no distinction between principals and accomplices as to criminal liability. *Wilson v. State*, 365 Ark. 664, 232 S.W.3d 455 (2006) (citing *Jefferson v. State*, 359 Ark. 454, 198 S.W.3d 527 (2004)); also *Standefer v. United States*, 447 U.S. 10, 20 (1980) (noting that "the fate of other participants [in a crime] is irrelevant").<sup>4</sup>

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<sup>3</sup>This statute states in relevant part:

In any prosecution for an offense in which the liability of the defendant is based on conduct of another person, it is no defense that:

. . . . .

(2) The other person has not been charged with, prosecuted for, convicted of, or has been acquitted of any offense or has been convicted of a different offense or degree of offense, based upon the conduct in question, even if the defendant and the other person were tried jointly[.]

<sup>4</sup>Standefer was tried separately from his co-defendant, Niederberger, who was acquitted of charges for which Standefer was later convicted. The matter came before the United States Supreme Court to determine whether the Ninth Circuit Court of Appeals correctly created an exception to *Dunn v. United States*, 284 U.S. 390 (1932), which allowed inconsistent verdicts to be reached in multiple counts filed against a single defendant. The Supreme Court upheld the *Dunn* ruling, finding that inconsistent

We find *Roleson* to be instructive as to appellant’s constitutional argument and conclude that the verdict in Lambert’s trial has no constitutional implications vis-a-vis the verdict in appellant’s trial. The threshold issue, as set forth in *Jeffers, supra*, is answered in the negative, and the inconsistent verdicts here do not demonstrate a constitutional error that renders the judgment in appellant’s criminal case a complete nullity.<sup>5</sup> *Accord Dowling v. United States*, 493 U.S. 342, 353-54 (1990) (finding that “inconsistent verdicts are constitutionally tolerable”); *also McCleskey v. Kemp*, 481 U.S. 279, 306-07 (1987) (finding that the defendant could not “prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty” in a petition for federal habeas relief) (emphasis in original); *Harris v. Rivera*, 454 U.S. 339 (1981) (per curiam); *Getsy v. Mitchell*, 495 F.3d 295 (6th Cir 2007).<sup>6</sup>

This determination precludes appellant from raising the issue of unconstitutional inconsistent verdicts for the first time in a postconviction petition. *See e.g. McCleskey, supra; Harris, supra.* verdicts in separate trials for co-defendants did not establish grounds for attacking a conviction. The Supreme Court reversed the Ninth Circuit, which had overturned Standefer’s convictions.

<sup>5</sup>The charges against appellant and Lambert did not include conspiracy liability, which is distinct from accomplice liability. *See e.g. Yedrysek v. State*, 293 Ark. 541, 739 S.W.2d 672 (1987). In criminal law, a basic tenet is that “[i]t is impossible in the nature of things for a man to conspire with himself.” *Morrison v. California*, 291 U.S. 82, 92 (1934).

<sup>6</sup>In *Harris*, a federal habeas case, the Court held that “even if the acquittal [of a co-defendant] rests on an improper ground, that error would not create a constitutional defect in a guilty verdict that is supported by sufficient evidence and is the product of a fair trial.” 454 U.S. at 344. While Harris could raise whether his trial was fairly conducted, the record in that matter indicated no constitutional error in his trial. Harris, “who was found guilty beyond a reasonable doubt after a fair trial, has no constitutional ground to complain that [his co-defendant] was acquitted.” 454 U.S. at 348.

In *Getsy*, cited by the State, petitioner’s argument mirrored the gravamen of appellant’s argument here. Counsel for Getsy “conceded that Getsy’s death sentence was not arbitrary or disproportionate at the time that it was imposed. Instead, Getsy contends that his sentence became unconstitutional only later when a different jury sentenced [his co-defendant] to life imprisonment for his role in the same offense.” 495 F.3d at 304. The Sixth Circuit rejected this argument based, in part, on the holding in *McCleskey, supra*. The court went on to find that “Getsy simply had no constitutional guarantee that his jury would reach the same results as prior or future juries dealing with similar facts, irrespective of the offense for which he was charged. 495 F.3d at 307.

A free-standing constitutional issue based on inconsistent verdicts does not present a claim that is cognizable in a Rule 37.1 petition.

We note that appellant alludes to purported inconsistent testimony given by the victim in the two jury trials as a possible explanation for the disparate verdicts, effectively presenting contradictory theories of liability. Appellant withdrew this allegation below but raised it again before this court. He uses this insinuation as support for his argument that this court should craft a new rule of procedure for reopening settled criminal matters based upon inconsistent verdicts. We find no applicability as the victim's testimony was substantially the same in both trials and decline to create such a procedural rule.

Finally, appellant couches his argument in terms of a violation of his right to due process under the constitutions of the United States and Arkansas. "Due process of laws is grounded in the concept of fundamental fairness." *Bill's Printing, Inc. v. Carder*, 357 Ark. 242, 253, 161 S.W.3d 803, 810 (2004) (Thornton, J., concurring) (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)); also *Dowling, supra*; *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997); *Davis v. State*, 314 Ark. 257, 863 S.W.2d 259 (1993). However, appellant failed to establish under a due process analysis that a fundamental unfairness existed as a result of the jury verdicts themselves. In *Standefor*, the Supreme Court noted:

In denying preclusive effect to [a co-defendant's] acquittal, we do not deviate from the sound teaching that "justice must satisfy the appearance of justice." This case does no more than manifest the simple, if discomfoting, reality that "different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." While symmetry of results may be intellectually satisfying, it is not required.

447 U.S. at 25 (internal citations omitted). In a later case, the court reiterated its aversion to

questioning inconsistent jury verdicts:

We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake. [W]ith few exceptions, once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment.

*United States v. Powell*, 469 U.S. 57, 66-67 (1984) (internal citations omitted). We find no fundamental unfairness in accepting a jury's verdict in appellant's case, even if it is inconsistent with another verdict, and appellant has failed to demonstrate otherwise.

Affirmed.

Glaze, J., not participating.